No. 645

In the

Supreme Court of the United States

October Term, 1954

RAYMOND C. ARMSTRONG,
Petitioner,

vs.

MARY R. ARMSTRONG,
GENERAL MOTORS CORPORATION, et al.;
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Mary R. Armstrong, one of the respondents, opposes the granting of a writ of certiorari for the reasons hereinafter set forth.

STATEMENT OF CASE

Raymond C. Armstrong and Mary R. Armstrong (nee Donovan) are natives of Hamilton County, Ohio. About 1914 they began in a small way a business in which they applied rubber tires on vehicles. Mary Donovan furnished part of the initial capital for that business through the sale of a diamond ring which belonged to her and a loan which she obtained from a relative.

She worked with Armstrong in establishing that business, without compensation, until they were married in the year 1917; and, thereafter, until the business was sold about the year 1923. Mrs. Armstrong actively worked in the business. The business was successful and out of its earnings they invested in General Motors stock. After the business was sold they removed to Florida, and shortly thereafter to the Isle of Pines where they purchased land and engaged in growing fruits and vegetables until a hurricane drove them out. Subsequently, they acquired real estate in Hamilton and Clermont Counties in Ohio and in Miami, Florida, and until they finally separated in October, 1950, for the most part they spent their winters in a residence in Miami and their summers, sometimes as late as Thanksgiving, in a residence they maintained in Clermont County, Ohio. Their real estate holdings in Ohio and in Florida were jointly held, as were their bank accounts, which were in Ohio banks, except for a small account in Miami. Notwithstanding difficulties which they encountered in the stock market crash of 1929, they were able to hold their General Motors stock, which, through stock dividends, had increased to a holding of 2250 shares when this litigation began.

In the summer of 1948 while they were living on their farm near Goshen in Clermont County, Mr. Armstrong hit his wife with the butt end of a revolver and knocked out some of her teeth, as a result of which they separated. Mrs. Armstrong for the purpose of protecting herself, in obtaining a proper property settlement, at that time took into her own possession, from safety deposit boxes held in their joint names, the General Motors stock certificates and the other stocks involved in this litigation, together with a large part of the bank accounts theretofore held in their joint accounts. Mr. Armstrong was notified at once that it was her purpose to hold what she had taken into her

possession until a division of their holdings could be agreed upon. Negotiations for such a settlement extended over a period of several weeks and before a settlement was reached they decided to go back together and from that time until October of 1950 they lived together in Miami, Florida and in Hamilton and Clermont Counties, in Ohio.

As a part of their reconciliation Mrs. Armstrong returned to their joint accounts a part of the money she had withdrawn from the banks and also paid the attorneys' fees which each had incurred while they were separated; and Mr. Armstrong gave to his wife the following signed statement: (Ex. 1 R. 189)

> "Ashville, N. C., Sept. 27, 1948
>
> I, Raymond C. Armstrong, solemnly before God swear that I love my wife, Mary R. Armstrong, and am assuring her of this because of a terrible misunderstanding. I shall never, never again bring us to the brink of divorce because I know my wife is and has always been working for my best interest and is all a good and faithful wife should be. I shall never bring up unpleasant subjects which have caused her so much worry in the past. Just as soon as possible after I arrive in Cincinnati I shall discontinue all legal actions which are pending and drop all charges I have placed against her. I shall do my utmost to make my wife happy in the future. I have not done so in the past. The stocks and moneys and war bonds which are now in the process of litigation she, Mary R. Armstrong, is to keep until such time as she decides to put them as they were before July 1, 1948. The jewelry she possesses is her's alone. I make the above statements of my own free will.
>
> RAYMOND C. ARMSTRONG,
> Ashville, North Carolina
> Sept. 27, 1948"

In October, 1950, Armstrong severely beat his wife and she thereupon left Miami and returned to Cincinnati, rented an apartment and notified Armstrong that she had established a residence in Cincinnati and would continue to live here. The negotiations for a property settlement were resumed, and when an agreement could not be reached, the appellant filed his complaint in the Florida court in which he sought a divorce.

Mr. Armstrong did not tell his attorneys anything about the agreement he had signed in Ashville, but on the contrary falsely and fraudulently signed and swore to his complaint that the respondent as a part of their 1948 reconciliation had promised to return the securities and the bank accounts to him and had not done so. The fraud thus practiced upon the Florida court was such that in October, 1951, the Florida court entered a decree granting Armstrong a divorce, upon the conclusion reached by the court in its decree that Mrs. Armstrong's retention of the securities and bank accounts was without his consent, and was illegal to the extent that she was guilty of conversion or embezzlement of her husband's property.

After the expiration of one year from the time she established her separate domicile in Cincinnati, Mrs. Armstrong on whom there was constructive service only in the Florida divorce action and who had entered no appearance therein, on February 1, 1952, commenced this action for divorce and alimony, in which she charged the appellant with gross neglect of duty, extreme cruelty, and with falsely and fraudulently obtaining the Florida divorce. In her amended petition the respondent pleaded the facts entitling her to an equitable division of the corporate stocks which the parties had accumulated; and in her prayer sought such equitable division; and, also, alimony out of the petitioner's share.

While his Florida divorce action was pending, the petitioner commenced in the Hamilton County, Ohio Common Pleas Court an action against his wife in which he sought a judgment requiring her to deliver to him the corporate stocks.

The respondent's action for a divorce and a property settlement and the petitioner's action for the delivery of the stocks, though not consolidated, were tried together (R. 22).

The Trial Court found that but for the divorce decree entered in Florida, the respondent was entitled to a divorce; and, as alimony, allowed her certain cash, bonds and jewelry; and ordered the respondent to cause to be transferred to her 1250 shares of the General Motors stock.

THE FLORIDA COURT HAD NO JURISDICTION TO ALLOW OR DENY ALIMONY

The petitioner specifies as his sole claim of error that the Supreme Court of Ohio erred in not giving full faith and credit to that part of the Florida decree as follows:

> "The Court, therefore, finds that the stock certificates and bonds registered in the name of the plaintiff, the possession of which has been taken by the defendant against the consent of the plaintiff, are the property of the plaintiff, and the defendant is hereby directed and specifically ordered to return the said stock certificates and bonds to the plaintiff within fifteen (15) days from the date of the entry of this decree or be subject to an order for contempt and such other relief that may be deemed proper by this Court.
>
> "This Court takes recognition of the fact that litigation is now pending in the State of Ohio relative to the recovery of these stocks and bonds as well as the settlement of other matters concerning property rights between the parties. This Court recognizes that the

> Courts of Ohio will have the ultimate determination of the question of property rights where the property itself is in the State of Ohio, but in that regard this Court makes a specific finding that both the plaintiff and the defendant herein were citizens and residents of the State of Florida and had been for many years, the matrimonial domicile was the State of Florida, and that when the defendant left the matrimonial domicile in October of 1950, she did so without cause or without the legal right to separate and set up her own domicile. Under those circumstances the Court finds that the wife defendant, MARY R. ARMSTRONG, did not have the right to separate and claim a separate legal domicile and in truth and in fact, her domicile was that of her husband.
>
> "This Court, therefore, finds the defendant has not come into this Court in good faith or made any claim to the equitable conscience of the Court and has made no showing of any need on her part for alimony. It is, therefore, specifically decreed that no award of alimony be made to the defendant * * *."

which he claims was a denial of alimony. The Florida court had no jurisdiction to include the foregoing in its decree.

An appearance, or personal service of process, was necessary before the Florida court could determine title to, or could enjoin the respondent to return, the stock certificates and bonds to the petitioner. *State* v. *Jacksonville R. Co.*, 15 Fla. 201. *Lovett* v. *Lovett*, 93 Fla. 611, 112 So. 768.

The Florida statutes confer upon the Court jurisdiction to determine alimony only where the wife files a bill, or cross bill, seeking such relief. The applicable sections are as follows:

> "Chapter 65, Section 65.07. ALIMONY PENDENTE LITE. — In every suit *by a wife* for a divorce founded upon any of the grounds mentioned in Section 65.04, she may in the bill for divorce, or by petition, claim alimony and suit money, and, if the bill seems well

founded, the court shall allow a reasonable sum therefor. Or if a wife defendant in any suit for divorce shall *in her answer, or by petition*, claim alimony or suit money, and the answer or petition shall seem well founded, the court shall allow a reasonable sum therefor."

"Chapter 65. Section 65.08. ALIMONY UPON DECREE OF DIVORCE. — In every decree of divorce *in a suit by the wife*, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in a lump sum."

"Chapter 65. Section 65.09. ALIMONY UNCONNECTED WITH DIVORCE. — If any of the causes of divorce set forth in Section 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce *upon bill filed* and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife."

It is the law in Florida that a valid final decree in a divorce suit in one state is res judicata in another state as to the right of the wife to alimony if the court has jurisdiction to grant or deny alimony and the question is in issue and is actually heard and determined or is necessarily involved, but the doctrine does not apply where the divorce is granted the husband in an ex parte proceeding wherein the court acquired no jurisdiction other than by constructive

service. *Pawley* v. *Pawley*, 46 So. 2d 464; 28 A.L.R. 2d 1358, cert. den. 10-23-50, 340 U. S. 866.

Since the respondent neither invoked the jurisdiction of the court to award alimony, nor was the denial of alimony necessarily involved, the foregoing was an attempt to exercise an in personam jurisdiction over a person not before the court, as to matters not in issue. Since Florida had no power to adjudicate respondent's rights in property which was in Ohio, the Ohio court was not required to give full faith and credit to that phase of the Florida judgment. A judgment of a court, having no jurisdiction to render it, is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Estin* v. *Estin*, 334 U. S. 541, 549.

In *Cooper* v. *Cooper*, 314 Ky. 413, 234 S. W. 2d 658, it was held that the wife, residing in Kentucky, having been sued for divorce by her husband residing in Florida, if she invoked the jurisdiction of the Florida court to grant her alimony, took the risk of being without a remedy, if the husband dismissed his complaint, since a non-resident wife may not have alimony under the Florida statutes. The Kentucky court held that her right to a property settlement and alimony survived the Florida decree of divorce; and this court denied certiorari. 344 U. S. 876.

DISTINCTIONS BETWEEN DECREES IN PERSONAM AND IN REM HAVE NOT LOST THEIR VALIDITY

While he stops short of making the claim, the petitioner seemingly argues that *Mullane* v. *Hanover Bank and Trust Co.*, 339 U. S. 306, has, in effect, repudiated all that this court said in *Estin* v. *Estin*; *May* v. *Anderson*, 345 U. S. 528, 73 S. Ct. 840, and related cases, concerning the distinction, in ex parte divorce cases, between the power of

a state to change the marital status and its power to exercise an in personam jurisdiction. We think it requires but a casual reading of the *Mullane* case to reach the conclusion that this court intended no such result.

THERE IS NOTHING IN THOMPSON v. THOMPSON THAT IS CONTROLLING IN THIS CASE

In his arguiment, the petitioner's principal contention is that a footnote reference, in the opinion in *Estin* v. *Estin* to *Thompson* v. *Thompson*, 226 U. S. 551, recognized, as law, "as late as June 7, 1948," that the state of matrimonial domicile, "had jurisdiction to settle all marital difficulties and its decrees should be recognized by all other states." Justice Pitney in the *Thompson* opinion (226 U. S. at page 562) clearly stated that the *Thompson* case was being decided upon the authority of *Atherton* v. *Atherton*, 181 U. S. 155.

The facts in the *Atherton* case are so similar to what the petitioner claims the facts are in this case, it is surprising that he does not depend upon the *Atherton* case instead of the *Thompson* case.

If, as petitioner claims, *Thompson* v. *Thompson*, "is the only sound rule," it follows that *Atherton* v. *Atherton* should be revivified, and all that this Court said in the *Williams* cases and later cases, concerning "matrimonial domicile," thereby made meaningless. In *Williams* v. *North Carolina*, 317 U. S. 287, this court said:

> "And all that would flow from the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go, while if he is to blame, he retains no such power. But such considerations are inapposite. As stated by Mr. Justice Holmes in his dissent in the

Haddock Case (201 U. S. P. 630, 50 L. ed 894, 26 S. Ct. 525, 5 Ann Cas 1) they constitute a 'pure fiction, and fiction always is a poor ground for changing substantial rights.' Furthermore, the fault or wrong of one spouse in leaving the other becomes under that view a jurisdictional fact on which this Court would ultimately have to pass. Whatever may be said as to the practical effect which such a rule would have in clouding divorce decrees, the question as to where the fault lies has no relevancy to the existence of state power in such circumstances. See Bingham. In the Matter of *Haddock* v. *Haddock*, 21 Cornell LQ 393, 426. 'The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders. *Atherton* v. *Atherton* which preceded *Haddock* v. *Haddock* and *Thompson* v. *Thompson*, 226 U. S. 551, 57 L. ed 347, 33 S. Ct. 129, which followed it, recognized that the power of the state of the matrimonial domicile to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to pick out any such line of distinction in the generality of the words of the full faith and credit clause. Moreover, so far as state power is concerned no distinction between a matrimonial domicile and a domicile later acquired has been suggested or is apparent."

and again in *Williams* v. *State of North Carolina*, 325 U. S. 231, this court said:

> "The domicile of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. ed 279, 63 S. Ct. 207, 143 A.L.R. 1273, supra, the jurisdictional requirements of domicile is freed from the confusing refinements about 'matrimonial domicile'."

In depending upon *Thompson* v. *Thompson*, the petitioner claims, "the undisputed evidence was that, since 1928, their matrimonial domicile has been at Miami, Florida." The respondent does not agree with that statement. In addition to the fact that Mrs. Armstrong separated from her husband because of his cruel treatment, it should be remembered that the parties were married in Cincinnati, and after they returned from the Isle of Pines, throughout the years they maintained a residence in Ohio, where they resided a part of each year, and a residence in Miami where they resided the remainder of each year.

If we eliminate the effect of matrimonial domicile from the opinion in *Thompson* v. *Thompson*, there is nothing in that case helpful to the petitioner. The court held, in the *Thompson* case, that under the laws of Virginia, the wife, since she was the offender, could not have alimony on a divorce decreed in favor of her husband. In this case if the respondent had invoked the jurisdiction of the Florida court to determine alimony, the chancellor would have been called upon to exercise a reasonable discretion in granting alimony, since no claim was made she had been guilty of adultery. *Cowan* v. *Cowan*, 147 Fla. 473, 2 So. 2d 869.

In the *Thompson* and *Atherton* cases the appellants did not raise the question whether the judgments deprived

them of due process of law, and that question was not considered by the Court in the opinions. Mr. Justice Pitney, who delivered the *Thompson* opinion, four years later, delivered the opinion in *Baker* v. *Baker, Eccles & Co.*, 242 U. S. 394, where the question of due process of law was raised, wherein the Court said:

> "It is now to well settled to be open to further dispute that the 'full faith and credit' clause, and the act of Congress passed pursuant to it, do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

and in that case, the Court answered the argument here made as to "the chaotic conditions that will result," when it said:

> "And to assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory."

The respondent, therefore, contends that, if the *Thompson* case were the only thing to be considered, certiorari should be denied. Be that as it may, there are other reasons for denying this petition.

IN OHIO, AND IN FLORIDA, ALIMONY COMPREHENDS MORE THAN A DUTY TO SUPPORT

In *Klump* v. *Klump*, 96 O. App. 93, 101, the Court said:

> "It was held in *Fisher* v. *Fisher*, 78 O. App. 125, 64 N. E. (2d), 328, that "an equitable distribution of money and property acquired by the parties during their married life," where a divorce is granted the wife,

is not an award of alimony even though it is so designated. In the opinion of the court, at page 127, Judge Miller put his finger on the statutory duty imposed on the trial court, in clear and discriminating language, as follows:

"The court could well have made the property division which is carried in the entry if the decree had been granted to the husband for the wife's aggression, because such division was nothing more or less than an equitable division of the property. Alimony begins when the court requires the payment to be made to a party from the aggressor's property, money or earnings."

That this is also the law in Florida is recognized in *Engebretsen* v. *Engebretsen*, 11 So. 2d 322, where the Court said:

"When a wife contributes her industry and labor or when she advances money to a business operated by her husband during coverture she cannot be deprived of her property, because the law will not permit or allow a forfeiture thereof to the husband when marital difficulties appear on the horizon, but the fruits of her labor and industry, or the money advanced, are special equities for adjudication."

The right which Mrs. Armstrong claimed to an equitable division of the property accumulated, as the result of her investment of capital and her labor, before and after the marriage, was not merely incident to the marital status. It was a right, in personam, which the ex parte Florida decree could not and did not destroy.

IN OHIO, AND IN FLORDIA, THE RIGHT TO ALIMONY SURVIVES AN EX PARTE DIVORCE

Long before this Court decided the first *Williams* v. *North Carolina* case, Ohio Courts had determined the public policy of Ohio to be that where one state had jurisdiction

over one of the parties and undertook to dissolve the marriage. Ohio would recognize the power of such other state to so dissolve it, but while a decree of divorce so rendered would be recognized, the state rendering it would not be permitted to project its jurisdiction into Ohio by constructive service, and thereby, affect property rights arising in Ohio by operation of Ohio law. *Cox* v. *Cox*, 19 O. S. 502; *Woods* v. *Waddle*, 14 O. S. 449; *McGill* v. *Deming*, 44 O. S. 645; *Doerr* v. *Forsythe*, 50 O. S. 726; *Bay* v. *Bay*, 85 O. S. 426; *Snyder* v. *Buckeye B & L Ass'n*, 26 O. App. 175; *Slapp* v. *Slapp*, 143 O. S. 105.

There is no distinction, in Ohio, as to the effect of a decree rendered in a foreign forum from that rendered in a domestic forum when the party was served by publication only, and entered no appearance. *Cox* v. *Cox*, supra; *Stephenson* v. *Stephenson*, 54 O. App. 239; *Wick* v. *Wick*, 58 O. App. 72.

The law of Florida, as decided in *Pawley* v. *Pawley*, supra, is that a divorce decree granted a husband in a foreign jurisdiction, (which was the matrimonial domicile), although valid as a dissolution of the marital status, does not foreclose the wife's right to an adjudication in Florida concerning the propriety of alimony, where the foreign court did not secure jurisdiction over the wife by personal service, or by appearance. It is interesting to note that Mr. W. G. Ward, who was petitioner's attorney in this Florida divorce case, was of counsel for Mrs. Pawley and that he, perhaps, had the *Pawley* case in mind, when this decree was drawn, so as to provide, "This Court recognizes that the Courts of Ohio will have the ultimate determination of the case of property rights where the property itself is in the state of Ohio."

CONCLUSION

In this case, as in *Estin* v. *Estin*, each of the States involved should be restricted to the matters of their dominant concern; and that result has been accomplished by making the Florida decree effective, insofar as it affects the marital status, and ineffective on the issue of alimony. Since Ohio does not discriminate against enforceable ex parte divorce decrees granted by a Sister State, no problem under the Full Faith and Credit Clause arises.

No federal question of substance is presented and a writ of certiorari should be denied.

Respectfully submitted,

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